Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1975

No. 75 - 678

ARTHUR H. SCHWARTZ, individually and in his capacity as Chairman of the New York State Board of Elections, REMO J. ACITO, WILLIAM H. McKEON, DONALD RETTALIATA, individually and in their capacity as Commissioners of the NEW YORK STATE BOARD OF ELECTIONS,

Appellants,

vs.

ROBERT I. POSTEL,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

MOTION TO DISMISS OR AFFIRM

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No. 75-678

ARTHUR H. SCHWARTZ, individually and in his capacity as Chairman of the New York State Board of Elections, REMO J. ACITO, WILLIAM H. McKEON, DONALD RETTALIATA, individually and in their capacity as Commissioners of the NEW YORK STATE BOARD OF ELECTIONS,

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MOTION TO DISMISS OR AFFIRM

The appellee, Robert I. Postel, moves this Court to dismiss the appeal herein, or in the alternative, to affirm the judgment of the United States District Court for the Southern District of New York, dated and filed July 14, 1975, on the ground that it is manifest that the questions presented on this appeal, and on which the decision and judgment below rests, are so unsubstantial as not to need or warrant further argument.

THE STATUTE INVOLVED AND THE NATURE OF THE CASE

A. The Statute.

This appeal raises the question of the constitutionality of New York State Election Law §472(a) and Sections 6201.1(c), (d), (e) and (f) of the New York State Campaign Code promulgated thereunder.

The New York State statute in question and its administrative progeny, the Fair Campaign Code, hereinafter Code, prohibits *inter alia* during the course of a political campaign, attacks based on race, sex, religion or ethnic background. Further prohibited are misrepresentations of a candidate's qualifications, misrepresentations of any candidate's position including, but not limited to, misrepresentation as to his voting record and misrepresentation of any candidate's party affiliation or party endorsement or endorsement by persons or organizations. The Statute and the Code further provide that complaints may be lodged with the New York State Board of Elections and that thereafter an administrative hearing be held. The Board, whose members are recommended by legislative leaders and the State Chairmen of the two major political

parties, may impose a fine up to $1,000 for each violation and may issue a report setting forth its findings and determinations. While the Board may and is authorized to file suit in the state courts for an injunction to enforce its decisions, no statutory provision is made for judicial review of the Board's actions except by way of an Article 78 proceeding (New York Civil Practice Law and Rules, Sections 7801 *et seq.* [McKinney's 1963]) the statutory replacement for relief previously provided by writs of certiorari to review, mandamus and prohibition.

B. The Proceedings Below.

The appellee, Robert I. Postel, received notice on October 25, 1974 that his opponent in the race for the Democratic nomination for Assemblyman in the 68th Assembly District, A. B. "Pete" Grannis, had filed a complaint with the appellant Board alleging violations of Sections 6201.1(d) and (f) of the Code. Specifically, as the Court below found, Grannis charged that certain Postel campaign literature misrepresented that Grannis had a patronage job in the New York State Department of Environmental Conservation; received major financial support from Republican "bigwigs" such as Lawrence Rockefeller and Henry Diamond; that the New York Court of Appeals had directed a new primary after having adduced proof that a number of Republicans had voted illegally in a Democratic primary; that a complaint against Grannis had been filed with the United States Commission on Civil Rights and that Grannis was a registered Republican in 1973. Appellee Postel in those proceedings as well as in the proceedings before the District Court maintained that in fact Grannis was a registered Republican as of 1973, was an appointed non-selective

service employee of the State Department of Environmental Conservation, was supported by Lawrence Rockefeller and Henry Diamond which were two of the eighteen largest contributors of approximately 350 individuals in Grannis' campaign, and that a complaint had been in fact filed with the United States Commission of Civil Rights at Washington, D.C.

ARGUMENT

Clearly the provisions of the Statute and the Code are so vague and overbroad, so prohibitive of protected speech, and so clearly repugnant to the Constitution, that they establish a system of prior restraints devoid of provisions for adequate judicial review. As such, the statutory and regulatory provisions were properly voided by the Court below, and further consideration by this Court is unnecessary.

The Statute and Code are violative of the Constitution in that some of their provisions are clearly applicable to protected speech while others are dangerously susceptible of being so applied. The prohibition of "attacks on a candidate based on race, sex, religion or ethnic background" exists in evident contravention of the principle that debate on public issues should be "uninhibited, robust — wide open . . . ." *N.Y. Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). That speech remain unfettered is mandatory relative to political campaigns since in such instances ". . . the Constitutional guarantee has its fullest and most urgent application." *Monitor Patriot Co. v. Roy,* 401 U.S. 265, 272 (1971). The court below vindicated these principles and clearly established that the American political arena of 1975 is fully able to control intemperate and possibly inane attacks on

individual candidates as was historically acceptable in the Smith, Taft and Tyler presidential campaigns.

The prohibitions against misrepresentation as well as those immediately referred to above, are unconstitutionally overbroad on their face, for they "... cast a substantial chill on the expression of protected speech." (10a).[1] These findings of constitutional deficiency are amply supported by decisions of this Court. *Lewis v. City of New Orleans,* 415 U.S. 130 (1974) and cases cited therein. The District Court noted that the word "misrepresentation" itself admits to diverse meanings, as it includes not only "false," but also "untrue, incorrect or misleading interpretations" (23a). This vagueness is compounded by the fact that what constitutes a candidate's "qualifications, party affiliation or party endorsement," or "position on a political issue" is not a matter which can be cogently determined by an administrative agency. In fact it is similar to the impossible task of defining beauty, which is only in the eyes of the beholder. In fact, as the District Court observed, such misrepresentation ". . . could be applied to almost all campaign speech" (13a).

The *N. Y. Times v. Sullivan* test of actual malice is inapplicable.[2] Even if such test were to be read into the Code provisions, they would nevertheless be unconstitutionally vague and overbroad, since the terms utilized are "plainly susceptible

1. Parenthetical references are to the District Court opinion set forth in the Appendix to the Jurisdictional Statement filed heretofore with this Court.

2. In *Schwartz v. Vanasco,* No. 75-677, the companion case, "the Board merely found that he had 'misrepresented' his party endorsement. There was no finding that the misrepresentation was deliberate or that it was made with knowledge of its falsity or reckless disregard of the truth." (13a).

of sweeping and improper application." *Keyishian v. Board of Regents of New York*, 385 U.S. 589, 599 (1967).

The administrative prior restraints imposed by the Statute and Code are, we submit, almost identical to those voided by this Court in *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963). In fact the extensive powers to restrain speech vested in the appellants are far broader than those there repudiated. This unfettered power when coupled with the total lack of immediate and effective judicial review renders the provisions untenable and dangerously defective.[3] The Court below noted that "[j]udicial participation is particularly necessary when important First Amendment expression is involved" (16a), *Southeastern Promotions Ltd. v. Conrad*, 43 L. Ed. 2d 488 (1975), noting that absent such procedural safeguards, the Statute be deficient and unconstitutional. *Freedman v. Maryland*, 380 U.S. 51 (1965); *Blount v. Rizzi*, 400 U.S. 410 (1971).

Finally, this Court has held that there is only "a single, extremely narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overridden." *New York Times Co. v. United States*, 403 U.S. 713, 726 (1971). This broad assault on the free exchange and intercourse of ideas in the domestic political arena is not such an exception.

Justification for imposition of prior restraints is totally absent. *New York Times Co. v. Sullivan, supra.*

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3. At oral argument, appellants conceded that solely enforcement was immediately available, while the Court below noted that review under the time consuming traditional provisions of NYCPLR Sections 7801 *et seq.* (McKinney 1963) *might* be available (24a).

CONCLUSION

WHEREFORE, appellee Robert I. Postel, respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument, and appellee Robert I. Postel, respectfully moves this Court to dismiss this appeal or, in the alternative, to affirm the judgment entered in this cause by the United States District Court for the Southern District of New York on July 14, 1975.

Dated: New York, New York
December 10, 1975

Respectfully submitted,

s/ Deyan Ranko Brashich
Attorney for Appellee

CERTIFICATION OF SERVICE

I hereby certify that on this 19 day of December, 1975, three copies of appellee's motion to dismiss or alternatively to affirm were mailed, postage prepaid, to Guy L. Heinemann, Esquire, State Board of Elections, Two World Trade Center, New York, New York 10047, counsel for the appellant. I further certify that all parties required to be served have been served.

Dated: New York, New York
December 19, 1975

s/ Deyan Ranko Brashich
Attorney for Appellee